



UNITED STATES PATENT AND TRADEMARK OFFICE

COMMISSIONER FOR PATENTS
UNITED STATES PATENT AND TRADEMARK OFFICE
P.O. BOX 1450
ALEXANDRIA, VA 22313-1450
www.uspto.gov

Joseph Giglio
100 Chapin Ave.
Red Bank NJ 07701

COPY MAILED

DEC 08 2008

In re Application of :
GIGLIO, JOSEPH :
Application No. 10/042,535 :
Filed: 01/09/2002 :
Title: THERAPEUTIC EXERCISE DEVICE :
WITH ADJUSTABLE FRAME FOR :
WHEELCHAIR USERS AND STANDARD :
FOUR LEGGED CHAIR USERS :

DECISION ON PETITION

This is a decision on the petition under 37 CFR 1.137(a), filed July 11, 2008, to revive the above-identified application.

The petition is **DISMISSED**.

This application became abandoned for failure to file a timely reply to the nonfinal Office action mailed September 9, 2004, which set a three-month shortened statutory period to reply. No extension of the period were obtained under 37 CFR 1.136(a). Accordingly, the application became abandoned on December 10, 2004.

A grantable petition to revive an abandoned application under 37 CFR 1.137(a) must be accompanied by:

- (1) The reply required to the outstanding Office action or notice, unless previously filed.
- (2) The petition fee as set forth in 37 CFR 1.17(l);
- (3) A showing to the satisfaction of the Director that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant 37 CFR 1.137(a) was unavoidable; and,
- (4) Any terminal disclaimer (and fee set forth in § 1.20(d)) required pursuant 37 CFR 1.137(d).

This petition lacks item (3) above.

Pro se petitioner filed the instant petition, asserting that the delay in filing the reply was unavoidable. Petitioner asserts that he suffered a serious illness caused by a massive stroke and is now disabled. Petitioner states that the stroke occurred on October 25, 2003. In support thereof, petitioner provided medical records for the periods of November 2003, December 2003, and September 2005.

DISCUSSION

The showing of record before the Office is inadequate to establish unavoidable delay within the meaning of 37 CFR 1.137(a)(3).

Decisions on reviving abandoned applications on the basis of “unavoidable” delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable (The word ‘unavoidable’ ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business.) In re Mattullath, 38 App. D.C. 497, 514-15 (1912) (*quoting Ex parte Pratt*, 1887 Dec. Comm’r Pat. 31, 32-33 (1887)); *see also Winkler v. Ladd*, 221 F. Supp. 550, 552, 138 U.S.P.Q. 666, 167-68 (D.D.C. 1963), *aff’d*, 143 U.S.P.Q. 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm’r Pat. 139, 141 (1913). Decisions on revival are made on a “case-by-case basis, taking all the facts and circumstances into account.” Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982. (D.C. Cir. 1982). Nonetheless, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was “unavoidable.” Haines v. Quigg, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987). Moreover, the Office notes that a delay caused by an applicant’s lack of knowledge or improper application of the patent statute, rules of practice or the MPEP is not “unavoidable.”

In the present petition, petitioner asserts incapacitation due to a medical condition as the cause of the delay in timely replying to the Office action. To establish a showing of “unavoidable” delay based upon incapacitation, petitioner must demonstrate that petitioner’s incapacitation was of such a nature and degree as to render him unable to conduct business (*e.g.*, correspond with the Office) during the period for reply, as well as explain the delay in the filing of a petition to revive. **Such a showing must be supported by a statement(s) from petitioner’s treating physician(s), and such statement(s) must provide the nature and degree of the petitioner’s incapacitation from the due date for reply until the date petitioner files a grantable petition to revive. Furthermore, the physician’s statement must be adequate to persuade the Office that from the time the reply was due until the filing of this petition petitioner’s medical condition was of such a degree of severity that it prevented him from acting to respond to the Office action, including even filing an extension of time for reply (and fee).**

Presently, petitioner has not met the showing of incapacitation due to a medical condition. Initially, the Office notes that petitioner did not provide a statement from his treating physician(s), setting forth the nature and degree of severity of petitioner’s incapacitation from the due date for reply until the date petitioner files a grantable petition to revive. Furthermore, the medical records do not reveal petitioner’s medical condition for the ENTIRE PERIOD from December 9, 2004 to the present. Rather, petitioner provided limited documentation for sporadic periods in November 2003, December

2003, and September 2005. Thus, it is unclear if there were any periods from December 9, 2004 to the present when petitioner was able to conduct business and take care of his affairs. Accordingly, petitioner has not provided the necessary documentation required to show that from the time the reply was due until the filing of a grantable petition petitioner's medical condition was of such a degree of severity that it prevented him from timely replying to the Office action of September 9, 2004.

CONCLUSION

The petition is **DISMISSED**. Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from the mail date of this decision. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)." Extensions of time are permitted under 37 CFR 1.136(a).

In the alternative, while the showing of record is not sufficient to establish to the satisfaction of the Director that the delay was unavoidable, petitioner is not precluded from seeking relief by filing a petition under 1.137(b) on the basis of unintentional delay. For petitioner's convenience, a form for filing a petition to revive under 37 CFR 1.137(b) is enclosed.

A grantable petition under 37 CFR 1.137(b) must be accompanied by:

- (1) The required reply to the outstanding Office action (unless previously filed);
- (2) The petition fee as set forth in 1.17(m) (currently an additional \$810.00 for a small entity); and,
- (3) A statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition was unintentional.

The Office notes that petitions under 37 CFR 1.137(b) are less burdensome (statement(s) rather than a showing accompanied by documentary evidence) to file and are evaluated under the less stringent "unintentional delay" standard. The Office is almost always satisfied as to whether "the entire delay...was unintentional" on the basis of statement(s) by the applicant or representative explaining the cause of the delay (accompanied at most by copies of correspondence relevant to the period of delay). MPEP 711.03(c)(II)(C). Many petitions originally filed under 37 CFR 1.137(a) end up being granted under 37 CFR 1.137(b) when the applicant realizes that sufficient evidence concerning the delay is too difficult to obtain or the cause of delay simply does not amount to "unavoidable delay" within the meaning of 37 CFR 1.137(a). *Id.* Since the requirements of 37 CFR 1.137(a) are more exacting than the corresponding requirements of 37 CFR 1.137(b), a petition under 37 CFR 1.137(a) is significantly less likely to be grantable as filed than is a petition under 37 CFR 1.137(b). *Id.* The Office usually must render a number of interlocutory decisions dismissing a petition under 37 CFR 1.137(a) and requesting additional evidence until either the applicant provides a satisfactory showing of unavoidable delay (in which case the petition can be granted) or the Office concludes that the applicant cannot provide a satisfactory showing of unavoidable delay (in which case the petition must be denied). Thus, the period between when an applicant first files a petition to revive and the Office renders a decision granting (or denying) that petition will, more often than not, be much longer if the petition is under 37 CFR 1.137(a) than it would have been if the petition were under 37 CFR 1.137(b). *Id.*

Further correspondence with respect to this matter should be addressed as follows:

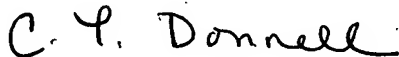
By mail: Mail Stop Petition
 Commissioner for Patents
 P.O. Box 1450
 Alexandria, VA 22313-1450

By fax: (571) 273-8300
 Attn: Office of Petitions

By hand: Customer Service Window
 Randolph Building
 401 Dulany Street
 Alexandria, VA 22314

Correspondence may also be submitted via the Electronic Filing System of the USPTO.

Telephone inquiries related to this decision should be directed to the undersigned at (571) 272-3211.



Christina Tartera Donnell
Senior Petitions Attorney
Office of Petitions

Enclosure: Form PTO/SB/64